

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE COMMISSIONER OF HEALTH

In the Matter of Community Memorial
Hospital

RECOMMENDED DECISION

An Independent Informal Dispute Resolution (IIDR) meeting was convened by Administrative Law Judge Allan W. Klein on February 15, 2005 by conference telephone call. The meeting concluded on that date, and the OAH record closed on that date.

Marci Martinson, Unit Supervisor, Licensing and Certification Program, Division of Health Policy, Information, and Compliance Monitoring, Minnesota Department of Health, 1645 Energy Park Drive, Suite 300, St. Paul, MN 55108-2970, appeared for the Department of Health.

Richard L. Breuer, CEO/Administrator, Cloquet Community Memorial Hospital, 512 Skyline Boulevard, Cloquet, MN 55720, appeared on behalf of Community Memorial Hospital.

Also attending the meeting were Mary Cahill, Christine Campbell, Kathy Axtell and Gail Wallin for the Department of Health. Also attending the meeting were Wendy Lonetto, Margaret Bjerkness, Shari Triska, and Andrea Peterson for Community Memorial Hospital.

NOTICE

Under Minn. Stat. § 144A.10, subd. 16(d)(6), this Recommended Decision is not binding on the Commissioner of Health. Under Department of Health Information Bulletin 04-07, the Commissioner must mail a final decision to the facility indicating whether or not the Commissioner accepts or rejects this recommended decision within 10 calendar days of receipt of this recommended decision.

Based upon the exhibits submitted and the arguments made, and for the reasons set out in the following Memorandum, the Administrative Law Judge makes the following:

RECOMMENDED DECISION

That the Department has failed to meet its burden of proof concerning Tag F311, and that tag should be DISMISSED and removed from the Statement of Deficiencies.

Dated this 25th day of February 2005.

/s/ Allan W. Klein

ALLAN W. KLEIN

Administrative Law Judge

Reported: Tape-recorded.
(One Tape)
No Transcript Prepared

MEMORANDUM

Introduction

In the vast majority of IIDR cases, the question of which party bears the burden of proof is of no consequence because one party or the other has clearly demonstrated that the alleged situation did or did not occur. The F311 Tag issued to Community Memorial Hospital is the exception – the question of which party has the burden of proof does matter because the weight of evidence is so evenly balanced that it is not possible to say that either party demonstrated that their version of events did happen. In such a situation, the decision maker is forced to look to the burden of proof to decide the matter. In this case, the burden of proof was on the Department. It failed to meet that burden, and thus the tag must be dismissed.

Cloquet Community Memorial Hospital operates an 88-bed long-term care facility.

During November, 2004, the Department conducted a survey at the facility which was completed on November 22, 2004. This survey resulted in a Statement of Deficiencies which included an F311 Tag, with a scope and severity rating of “D”. This tag was based upon the surveyors’ observations of a resident, E.M., who the surveyors believe had not been assisted to the toilet in a timely manner. The facility disagreed with this deficiency, and an IIDR meeting was scheduled.

Underlying Facts – Both Versions

Kathy Axtell and Gail Wallin are very experienced surveyors, each having conducted approximately 200 surveys. They have worked together for a number of years, and have developed a system of surveying which should capture any significant event. On the morning of October 19, 2004, at 6:10 a.m., they began observing a number of the residents on the second floor of the facility. Their notes indicate that E.M. was first observed in the day room at 6:25 a.m. At 6:48 a.m., she was moved to the dining room, where they believe she remained until 7:50 a.m., when she was brought back to the day room. They believe that she remained in the day room until 9:19 a.m.,

when she was taken to her room for toileting. They believe that either one or the other of them had her under observation during the entire period from 6:25 a.m. to 9:19 a.m., and that during this 2:54 period, E.M. was not taken to the toilet. E.M.'s care plan specifies that E.M. is able to stay dry during the day with toileting every two hours, or upon request. Since the surveyors did not see E.M. being toileted during the two-hour period, they issued the deficiency tag.

The facility asserts that E.M. was, in fact, toileted twice during the period between 6:25 and 9:19 that morning. At approximately 7:30 a.m., just after she had finished her breakfast, E.M. began to ask to be taken to the toilet. It was her habit to call out, continuously, until she was assisted, and the staff was aware that she could become quite loud. Sheri Triska, an R.N., heard E.M. begin to call out, and was aware that the surveyors were in the dining room. She was concerned that E.M. would become loud, and was concerned about how the surveyors might respond to this, so she directed Dennis Morris, a Nursing Assistant, to take E.M. to the toilet. Morris pointed out that he was feeding two other people, and that their food would get cold if he left. Triska replied that she would feed those two while he took E.M. to her room for toileting. So Morris took E.M. to her room, assisted her with the toileting, and then returned her to the dining room. He then resumed feeding his two charges, and Triska went off to do other things. After E.M. was moved to the day room around 7:49 a.m., she remained there for approximately 45 minutes when she again asked to be taken to the toilet. Another Nursing Assistant, Margaret Bjerkness, was scheduled to go on break at 8:30 a.m., but she heard E.M. call out, and decided to assist her before taking her own break. So Bjerkness took E.M. to her room, assisted her with the toilet, and then returned her to the day room.

The surveyors claim that they were observing E.M. throughout the entire morning, and that she did not leave their sight at any time between 6:25 a.m. and 9:19 a.m. (when all persons agreed that she was taken to the toilet by Dennis Morris). They emphatically state that Morris did not take her from the dining room to her room for toileting and they emphatically state that Bjerkness did not take her from the day room to her own room for toileting. On the other hand, Morris and Triska state that they know she was toileted around 7:30 by Morris, and Bjerkness testifies that E.M. was toileted by her at 8:30 a.m. There is a stark and irreconcilable conflict between the two sets of testimony.

Analysis and Decision

The Department, which is claiming that a deficiency existed, bears the burden to prove, by a preponderance of the evidence, that the deficiency did exist. The term "preponderance of the evidence" is the lowest possible standard of proof. It is lower than "clear and convincing evidence," and far lower than "beyond a reasonable doubt." The standard "preponderance of the evidence" means that viewing the entirety of the evidence, there is more weight on one side than the other.^[1] Oftentimes the scale will be tipped, one way or the other, by the trier of fact's determination that one witness is more credible than another. Such credibility determinations, in turn, are often based

upon a comparison of the witness's testimony with extrinsic facts which tend to suggest that one witness's testimony is closer to the truth than another's.

In this case, the Administrative Law Judge is unable to find any extrinsic facts to discredit either side. He cannot determine that either one of them is not telling the truth. He finds the weight of the evidence to be equal on both sides, and thus finds that neither side has demonstrated, by a preponderance of the evidence, that their version of the facts is correct. In such situations, the decision maker must conclude that the party having the burden of proof has failed to prove the facts at issue. Therefore, in this case, it is concluded that the Department has failed to meet its burden of proof, and therefore the tag must be dismissed.

A.W.K.

^[1] One commentator has noted that "weight" does not mean the number of witnesses or exhibits. Instead, the evidence preponderates when it is "more convincing to the trier of fact than the opposing evidence". It is when "the existence of the contested fact is more probable than its non existence." 2 McCormack on Evidence § 339 (5th Edition, West Pub. Group, 1999).